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IN THE

Supreme Court of the United States

ANDREW S. NATSIOS, *et al.*

Petitioners,

v.

NATIONAL FOREIGN TRADE COUNCIL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES: AUSTRIA, BELGIUM, DENMARK, FINLAND, FRANCE, GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, NETHERLANDS, PORTUGAL, SPAIN, SWEDEN, AND THE UNITED KINGDOM AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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BRIEF FOR THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES: AUSTRIA, BELGIUM, DENMARK, FINLAND, FRANCE, GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, NETHERLANDS, PORTUGAL, SPAIN, SWEDEN, AND THE UNITED KINGDOM AS AMICI CURIAE IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST[1]

This brief is submitted on behalf of the European Communities and their 15 Member States: Austria,

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden, and the United Kingdom.[2] These parties, collectively referred to here as the "EU" or "European Union," respectfully submit this brief as *amici curiae* in support of the decision below, affirming the District Court's order enjoining enforcement of and declaring unlawful the Act of June 25, 1996, chapter 130, § 1, 1996 Mass. Acts 210, *codified at* Mass. Gen. Laws, ch. 7, §§ 22G-22M ("Massachusetts Burma Law"). The *amici* filed briefs as *amici curiae* in both the District Court and the Court of Appeals.

The *amici* regularly engage bilaterally with the United States Government on sensitive and important matters of foreign affairs—including such matters as the appropriate response to the situation in Burma. As regular participants in such diplomatic endeavors, the EU is concerned that state and local laws such as the Massachusetts Burma Law interfere with the normal conduct of international relations and raise questions about the ability of the United States to honor its international commitments. The EU is also concerned that, if upheld, the Massachusetts Burma Law will lead to a proliferation of similar efforts. The effect would be to greatly increase the difficulty of the U.S. Government to speak consistently and with one voice on matters of foreign affairs, thus exacerbating EU-U.S. tensions and undermining the important efforts of two key players in the area of foreign policy.

The EU's opposition to the Massachusetts Burma Law, however, should not be taken to mean that the EU is indifferent to the situation in Burma or supports Burma's present leadership. The EU's policies towards

[2] The European Communities ("EC") enjoy legal personality both internally and internationally under applicable provisions of the EC Treaties.

Burma have been plainly set forth in Addendum 1 to the EU's First Circuit Brief.[3]

For the reasons explained below, the EU respectfully submits that the Massachusetts Burma Law is a misguided means of addressing the conditions and effecting needed change in Burma.

SUMMARY OF ARGUMENT

The purpose of this brief is not to expand on the U.S. constitutional arguments that have been articulated by the National Foreign Trade Council ("NFTC"). Rather, the European Union seeks to assist this Court in understanding the concrete and negative ramifications that the Massachusetts Burma Law is having on its dealings with the United States, in terms of both foreign policy and commercial relations.

As it did in the District Court and the First Circuit, the EU respectfully calls to the Court's attention the following points: (i) the Massachusetts Burma Law interferes with the normal conduct of EU-U.S. relations; (ii) the Massachusetts Burma Law has created a significant issue in EU-U.S. relations, including—but not limited to—raising questions about the ability of the United States to honor international commitments into which it has entered; and (iii) overturning the judgment enjoining the Massachusetts Burma Law risks a proliferation of similar non-federal sanctions laws, aggravating these effects.

[3] *See also* Council Common Position of October 11, 1999 concerning the extension of Common Position 635/96 on Burma/Myanmar, 1999 OJ (L267) 1; European Parliament Resolution on Burma of April 15, 1999, 1999 OJ (C 219) 405.

ARGUMENT

I. THE MASSACHUSETTS BURMA LAW INTERFERES WITH THE NORMAL CONDUCT OF EU-U.S. RELATIONS

The European Union, as well as its Member States, has always conducted foreign relations with the Government of the United States.[4] The EU notes that the individual American states neither send ambassadors to nor receive ambassadors from any foreign country and do not make treaties or international trade agreements. As a matter of international comity, moreover, no national government can engage directly with an individual U.S. state in a matter of foreign affairs. To do so would create insurmountable obstacles to effective diplomacy by creating confusion about which entity speaks for and acts on behalf of American interests.

Foreign affairs are conducted among governments and international organizations with legal competence to take international action, such as the recognition of governments, the regulation of trade, or the provision of foreign assistance. Foreign policy is made by governments or international organizations with such authority, and effective foreign relations are undertaken only by governments and international organizations that can make and keep commitments in these areas. Accordingly, all foreign policy activities of the European Union and of its individual Member States have traditionally involved the Government of the United States and not the governments of the individual U.S. states.

The Massachusetts Burma Law constitutes a direct interference with the ability of the EU to cooperate and carry out foreign policy with the United States. Contrary to the centuries-old practice in the field of interna-

[4] The EU operates on the understanding that, in relations with foreign nations on matters of diplomacy, it is the Executive Branch—and not the U.S. Congress—that speaks for the United States and serves as the U.S. interlocutor.

tional relations, Massachusetts now purports to conduct foreign policy on a state level by seeking to force the EU to impose additional sanctions on Burma and EU companies to abandon activities in Burma.

In contrast to the methods adopted by the Massachusetts Burma Law—and which Massachusetts through that Law has attempted to impose on others—the EU had specifically chosen not to ban economic activity in Burma in favor of other policy measures toward Burma. The Massachusetts Burma Law is deliberately aimed at influencing the foreign policy choices of the European Union. It is aimed at sanctioning the activities of EU companies which are not only taking place in a third country but which are also lawful under EU laws.

Massachusetts officials have also sought to engage the EU in direct discussions of Burma policy. While the EU has been willing to explain its Burma policy in writing to a Massachusetts representative, *see* Letter dated March 30, 1998 from Ambassador Hugo Paemen to Representative Byron Rushing (Addendum 3 to the EU's First Circuit brief), it has engaged in direct discussions only with the participation of U.S. State Department officials, because it regards actions of this kind as an interference with normal diplomatic relations and channels. Under settled authority, the EU simply cannot deal with the Commonwealth of Massachusetts on matters of Burma policy.

Massachusetts' injection of its dissonant voice into the EU-U.S. dialogue calls into question the settled lines of authority in U.S. foreign policy. These established processes serve fundamental purposes and permit the United States to speak clearly and with one voice in its relations with other nations through its Executive Branch officials. From the perspective of the EU, the Massachusetts Burma Law weakens the ability of the U.S. Government to conduct foreign policy in this manner with respect to Burma. It has thus undermined the ability of the EU to make foreign policy with the United

States. While the U.S. Government has rejected the use of an extraterritorial secondary boycott, an individual U.S. state has acted to the contrary, imposing just such an economic boycott to the detriment of EU interests.[5] As a secondary boycott, targeted not at the regime in Burma but at nationals of third countries who may do business there, the Massachusetts Burma Law is particularly disruptive of policy cooperation among governments, because such boycotts injure the interests of the countries with which the United States might seek to coordinate policies. As we explain next, this indeed has been the effect of the Massachusetts Burma Law.

II. THE MASSACHUSETTS BURMA LAW HAS CREATED AN ISSUE OF SERIOUS CONCERN IN EU-U.S. RELATIONS

The adverse effect of Massachusetts' action on EU interests has become one of the leading issues in EU-U.S. discussions on Burma, focusing the governments on an area of conflict and away from opportunities to achieve shared foreign policy objectives in support of human rights and political reform in Burma. This legislation has strained the political and economic climate between the European Union and the United States.

As a result of the Massachusetts Burma Law, the EU has felt obliged to lodge formal protests with the Government of the United States. On January 22, 1997, the European Union delivered an official *Note Verbale* to the United States Department of State protesting the Massachusetts Burma Law (Addendum 4 to the EU's First Circuit brief). In addition to such formal actions, the Massachusetts Burma Law has been the topic of intensive discussions between the European Union and

[5] It is simply not correct, as suggested by Petitioners and supportive *amici*, that the Massachusetts sanctions go no further than those imposed at the national level.

the United States at the highest levels, including at the twice yearly EU-U.S. Summit.[6]

Furthermore, the EU, as well as Japan, has challenged the Massachusetts Burma Law before the World Trade Organization ("WTO"), because in its view the Law conflicts with international obligations entered into within the framework of the WTO.[7] Given that enforcement of the Massachusetts Burma Law has been enjoined, the European Union and Japan requested suspension of the WTO challenge to the Law on February 9, 1999. The EU made this request simply as a temporary and conditional measure, due to the fact that the law is without immediate effect. This suspension does not reflect a lessening of the EU's concern at the effects of the Law or its negative impact on EU-U.S. relations. As the EU has made plain to both the chairman of the WTO dispute settlement panel constituted to hear this challenge and to U.S. authorities, the EU will begin new WTO proceedings should the current injunction on enforcement of the Law be lifted or should the EU otherwise determine that the Law is having a negative effect in any manner on European companies.[8]

[6] *See* Senior Level Group Report to the EU-US Summit, Washington, at 3 (December 17, 1999) <http://www.eurunion.org/news/summit/Summit Annex/SLGRept.html>.

[7] The WTO violation alleged by the EU encompasses only one aspect of the harm caused by the Burma Law. Although well aware that it was therefore without a full remedy at the WTO, the EU pursued its WTO rights on this issue due to the legally binding effect that a WTO decision would have on the United States. In the context of this brief, the EU is referring to the WTO action only as further evidence that the Law has created tensions between the EU and the U.S. The EU respectfully submits that only the WTO is competent to rule on the question of whether or not a measure is compatible with WTO rules and that—absent a WTO ruling on the measure in question—this Court must set the question of WTO compatibility of a measure to one side.

[8] *See* Letter of Ambassador Roderick Abbott and Ambassador Nobutoshi Akao to Mr. Ole Lundby, Chairman, WTO Panel on

Finally, in addition to the adverse effects described above, the EU respectfully submits that—prior to being enjoined—the Massachusetts Burma Law had a direct and disruptive impact on the commercial interests of the European Union.[9] EU companies—including those with no commercial presence within the Commonwealth of Massachusetts—received unsolicited requests from the Commonwealth for detailed information on possible business activities in Burma. The information was used in drafting Massachusetts' restricted purchase list. That list required regular updating and thus repeated decisions about companies' business links with Burma. The EU understands that this list was used not only by the Commonwealth of Massachusetts, but also by other state and local governments and private parties that may have wished to target companies with activities in Burma, since it was readily available on the Internet. The European Union remains concerned at the chilling effect these activities inevitably had and continue to have on EU companies doing business in the United States.

"United States—Measure Affecting Government Procurement," February 9, 1999 (Addendum 5 to the EU's First Circuit brief); Letter of Ambassador Roderick Abbott to Ambassador Rita Hayes, February 9, 1999 (Addendum 6 to the EU's First Circuit brief). In accordance with Article 12.12 of the WTO Dispute Settlement Understanding, the EU's 1998 WTO case lapsed on February 10, 2000, but this fact does not alter the views of the EU as regards pursuing its rights before the WTO.

[9] EU-U.S. commerce is substantial, amounting to approximately $372 billion in direct investment by EU companies in the United States and approximately $8 billion in direct investment by EU companies in the Commonwealth of Massachusetts. By best estimate, the restricted purchasing list includes 53 foreign companies with subsidiaries, affiliates, or branches in Massachusetts and 228 foreign companies not established in Massachusetts. *See* Addendum 7 to the EU's First Circuit brief.

III. FAILURE TO AFFIRM THE INJUNCTION AGAINST THE MASSACHUSETTS BURMA LAW RISKS A PROLIFERATION OF SIMILAR SANCTIONS LAWS

The EU respectfully expresses its concern that failure to enjoin the Massachusetts Burma Law will lead to the proliferation of other U.S. state and local sanctions laws. Former Governor William Weld, on signing the Massachusetts Burma Law, specifically expressed the hope that other U.S. states would follow Massachusetts' example. At present there are 22 U.S. local jurisdictions, including New York City, Los Angeles, and San Francisco, that have passed laws effectively prohibiting their public agencies from contracting with companies that do business in Burma. An additional eleven U.S. states and municipalities have considered or are now considering such proscriptions.[10]

As the *amicus* briefs filed in support of the Massachusetts Law make clear, state and local sanctions laws are not limited to Burma. Instead, a wide variety of similar laws are already in existence or contemplated. *See*, *e.g.*, Brief of the Comptroller of the City of New York, *et al.*, as *Amici Curiae* in Support of Petitioners at 2-4; Brief of *Amici Curiae* States of Arkansas, *et al.* in Support of Petitioner at 1-2 & nn. 1-3. At least eleven U.S. states and municipalities have enacted measures purporting to regulate business activities in Nigeria, Tibet, Indonesia, Switzerland, Northern Ireland, or Cuba, and at least 18 state and local governments have considered or are considering similar measures restricting business ties to Egypt, Saudi Arabia, Sudan, Pakistan, Turkey, Iran, North Korea, Iraq, Morocco, Laos, Vietnam, or China.

Thus, while—as discussed above—the Massachusetts Burma Law standing alone certainly presents difficulties

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[10] The fact that nearly forty state and local entities have filed *amicus* briefs urging reversal of the First Circuit only underscores the threat of even greater proliferation of sub-federal sanctions.

in the conduct of EU-U.S. relations, the EU's concern is much broader than simply the disruption caused by this particular law. State and local sanctions, and any proliferation thereof, greatly increase the difficulty of the U.S. Government to speak consistently and with one voice on matters of foreign affairs, thus exacerbating tensions in EU-U.S. relations.

The United States and the European Union have expended considerable effort seeking to resolve their differences over U.S. extraterritorial economic sanctions. This effort has not yielded progress on the issue of extraterritorial sanctions imposed by state and local governments, a shortcoming that is of considerable concern to the EU. In recognition of this danger of proliferation of sanctions measures, the EU and the U.S. agreed at the EU-U.S. Summit on May 18, 1998 on a set of principles covering the future use of sanctions in the context of the Transatlantic Partnership on Political Cooperation.[11] This included agreeing that the EU and the U.S. "will not seek or propose, and will resist, the passage of new economic sanctions legislation based on foreign policy grounds which is designed to make economic operators of the other behave in a manner similar to that required of its own economic operators" and that such sanctions will be targeted "directly and specifically against those responsible for the problem." Crucially, it was also agreed that it is in the interests of both the EU and the U.S. "that the policies of governmental bodies at other levels should be consonant with these principles and avoid sending conflicting messages to countries engaged in unacceptable behavior." The EU believes that the enactment of more state or local sanctions laws will contradict the above-mentioned engagements and would thus undermine these important efforts of the European

[11] Transatlantic Partnership on Political Cooperation, at 2 (May 18, 1998) <http//www.europa.eu.int/comm/dg01/0518tppc.htm>.

Union and the United States in the area of foreign policy.

CONCLUSION

For the foregoing reasons, the European Union respectfully submits that the judgment of the First Circuit should be affirmed.

Respectfully submitted,

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